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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

Date: JUL 12 2012 Office: NEBRASKA SERVICE CENTER

IN RE: Petitioner: [redacted]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on March 15, 2010, the AAO dismissed the appeal. Counsel filed a motion to reopen and a motion to reconsider (MTR) the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion to reopen will be granted, the motion to reconsider will be denied, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a hotel management company. It seeks to employ the beneficiary permanently in the United States as a marketing analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a master's degree in marketing as set forth on the ETA Form 9089. The AAO affirmed this determination on appeal and also concluded that the record did not establish the petitioner's continuing ability to pay the proffered wage.

In pertinent part, section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

In dismissing the appeal, the AAO concluded that the beneficiary did not satisfy the minimum level of education stated on the labor certification and that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part:

> *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an

> application or petition must, when filed, also establish that the decision was incorrect *based on the evidence of record at the time of the initial decision.*

On motion to reconsider, the petitioner failed to support the motion with any pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law or policy. Therefore, the motion, to the extent it is a motion to reconsider, will be denied for failing to meet applicable requirements. 8 C.F.R. § 103.5(a)(4).

On motion to reopen, counsel did not submit any additional evidence or state new facts to show that the beneficiary satisfied the minimum level of education stated on the labor certification. Therefore, the AAO's decision on this issue will be affirmed. It has not been established that the beneficiary has earned a master's degree in marketing. Her masters of business administration, as explained in detail by the AAO, has not been established to have been in the field of marketing.

However, counsel submits new evidence to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The motion thus qualifies for consideration under 8 C.F.R. § 103.5(a)(2) only to the issue of whether the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on August 24, 2006. The proffered wage as stated on the ETA Form 9089 is $49,920 per year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of $13,441,710, and to currently employ 641 workers.

On motion, the petitioner submitted a letter from its controller dated April 8, 2010 which establishes the petitioner's continuing ability to pay the proffered wage as of the priority date per 8 C.F.R. § 204.5(g)(2). Accordingly, that portion of the AAO's March 5, 2010 decision will be withdrawn.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider is denied. The motion to reopen is granted and the decision of the AAO dated March 15, 2010 is affirmed. The appeal is dismissed, and the petition is denied.